when an easement or a profit *à prendre* is granted. Such a grant confers upon the grantee a complex aggregate of jural relations. As against the general owner of the property in question the grantee acquires privileges to enter upon the land and do certain acts thereon, as well as rights against the owner that he shall refrain from interfering with the doing of the privileged acts. Does the law also confer upon the grantee rights against third persons that they shall refrain from acts which will prevent or interfere with the doing of the privileged acts? The instrument granting the easement or profit is of course silent upon the question. It remains for the law to attach to the grant such jural relations as sound policy indicates. There is authority for the proposition that the resulting easement or profit does include the suggested rights against third persons.[14] The analogy to the case in hand is strikingly close if we assume that the grantor of the easement or profit reserves the privilege and power of granting similar rights, etc., to others, i. e., that the easement or profit is not "exclusive."[15]

On the whole, considerations of policy seem to the present writer to be in favor of the result reached by the court in the principal case. It is desirable that public utilities be operated efficiently. This is hardly to be expected if they are exposed to unlimited competition with irresponsible persons. To permit them to bring suits to prevent such competition, as well as to permit a representative of the public to institute criminal prosecutions or (in some jurisdictions) injunction proceedings, seems therefore a sound rule. And a similar result was reached in *Farmers' & Merchants' Co-op. Tel. Co. v. Boswell Tel. Co.* (1918, Ind.) 119 N. E. 513, in which an injunction was granted at the instance of a licensed telephone company, whose franchise was not exclusive, against an unlicensed company. In that case the unlawful construction by the defendant of poles and lines on the public highway even more clearly constituted a public nuisance.

ADVERSE POSSESSION BY TRUSTEE UNDER TRUST VOID AS A PERPETUITY: DOES IT ENURE TO SUPPOSED CESTUI BY ESTOPPEL?

An interesting problem which is somewhat unique in legal history, is presented by a case which has come three times before the Maryland Court of Appeals and now awaits solution on the fourth appeal.

[14] *Wilson v. Mackreth* (1766) 3 Burr. 1824; *Fitzgerald v. Firbank* [1897] 2 Ch. 96.

[15] The language in the easement and profit cases suggests the possibility that if the grant were not exclusive it would confer what is commonly called a mere "license" and that therefore the grantee would not acquire these rights against third persons. *Cf.*, however, Hohfeld, *Faulty Analysis in Easement and License Cases* (1917) 27 YALE LAW JOURNAL, 66, 92-99.

American Colonization Society v. Soulsby (1917) 129 Md. 605, 99 Atl. 944, L. R. A. 1917C 937; s. c. (1917) 131 Md. 296, 101 Atl. 780; s. c. (1918) 104 Atl. 120. One Mrs. Donovan executed a declaration of trust in 1886 of certain real estate in Baltimore. After reciting that she intended the American Colonization Society to have the benefit of the real estate to the extent of the declaration of trust, and to become possessed of a vested interest in the property beyond peradventure, she declared that she held the property in trust for herself for life, and after her death in trust for Latrobe and Harvey and their heirs, in trust to pay the net income to the American Colonization Society for the transportation of colored persons to Liberia, or if the net income was not thus exhausted, for public schools for the education of colored children in Liberia. This was a declaration of a trust upon a trust upon a use. Mrs. Donovan died in March, 1890, leaving a will. Upon her death the trustees filed their petition in the Circuit Court of Baltimore, alleging the declaration of trust and asking the court to supervise the execution of the trust. The Society filed its answer and the court made its order assuming supervision of the trust and directing the trustees to report annually. The trustees took possession and have collected the rents and paid the net income for 27 years under the terms of the deed to the American Colonization Society.

More than 20 years after the death of Mrs. Donovan her heirs and residuary devisees filed a bill against the trustees and the society to have the deed of trust set aside on various grounds, among others because it violated the rule against perpetuities as established in Maryland. The court held that the declaration of trust was void as attempting to create an active trust with no time limit. In Maryland, an active trust of unlimited or indefinite duration even for charitable uses is held to be one form of perpetuity. The bill of the heirs was, however, dismissed, and the heirs were held barred from recovery because of the adverse possession of the trustees for 27 years, 20 years being the period of adverse possession.

The Colonization Society then filed a bill against the trustees demanding the corpus of the trust property, and the State also filed a bill against the trustees claiming the property as escheated to the State. Both of these bills were dismissed. It was held that the property was not escheat for two reasons:—in the first place, Mrs. Donovan did not die without heirs; and in the second place, she did leave a will with a residuary clause.[1]

Since the declaration of trust was void, because transgressing a fundamental rule of the policy of the State, the Colonization Society could not claim any benefit from the fact that it was named as beneficiary in the Donovan deed. The deed did convey to the trustees a

[1] 10 R. C. L. 604.

legal estate, but the beneficial interest sought to be created under it was void. Hence, the possession of the premises by the trustees was in no manner the possession of the petitioning society. The petition of the society for the transfer of the entire corpus of the estate was therefore dismissed.

The question remains and is now pending on appeal whether the trustees take for their own benefit by adverse possession, subject only to a moral obligation to carry out the trust, or whether their adverse possession enures to the benefit of the Society, giving it a right to the income if not to the corpus.

It is argued by the Society that the trustees are estopped from setting up the claim that the Society has no interest under the trust; that the trustees, having gotten their possession under the deed, be it void or valid, and having held under claim of trusteeship for the Society, are in no position to deny that the Society for whose benefit they got the possession, has no interest. The cases of *Board v. Board*[2] and *Hansen v. Johnson*[3] are cited in support of this contention.

As is pointed out in an article by the present writer in the January number of this JOURNAL,[4] the recognition of an interest in a third person by an adverse possessor does not necessarily make his possession enure to the benefit of such third person. Such a case as *Board v. Board* has no application to uphold an estoppel of one who claims title under an invalid instrument. A clear distinction is drawn by the English cases between an estoppel arising from adverse possession under a devise or grant valid as a conveyance of a defective or possessory title, and that under a devise or grant invalid as an instrument of conveyance.[5] It is a general rule that an adverse claimant does not take a greater estate than he claims; but in this case the trustees were claiming a fee as against the heirs and devisees of Mrs. Donovan, on behalf of the trust. This is sufficient to bar their claim to possession, at least while the trust continues.[6]

The result would seem to be that the trustees acquire title by adverse possession subject only to a moral obligation to account to the Society. It has been suggested, however, in a learned note in the MINNESOTA LAW REVIEW,[7] that the court should have disregarded the direction for perpetual active duties by the trustees and compelled a transfer

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[2] (1873) L. R. 9 Q. B. 48.

[3] (1883) 62 Md. 25.

[4] (1919) 28 YALE LAW JOURNAL, 219, 228.

[5] See also *Bomar v. Stephens* (1848, Tenn.) 9 Humph. 546; *Re Stringer's Estate* (1877) 6 Ch. D. 110; *Re Anderson* [1905] 2 Ch. 70.

[6] (1917) 27 YALE LAW JOURNAL, 221, 222. See also *Churcher v. Martin* (1889) 42 Ch. D. 312; *Yardley v. Holland* (1875) 20 Eq. 428, 440, 441; *Re Lacey* [1899] 2 Ch. 149; Lightwood, *Time Limit on Actions*, 82.

[7] (1919) 3 MINN. L. REV. 39.

of a legal title to the Society; thus disregarding the invalid restraints on the donation and sustaining the gift, instead of destroying the gift along with the restraints. It is difficult, however, to achieve this result, as the donor intended an active trust instead of a direct gift to the charitable corporation.

The strongest claim of the Society would seem to be that the trustees by filing their petition as such and by undertaking the trust under the direction of the court and under its decree of 1890, have declared themselves trustees for the Society. The difficulty is that this declaration of trust also being without any time limit would be void under the peculiar Maryland rule that a perpetual provision by way of trust running to remote generations, even in favor of charity, is a kind of perpetuity. The implied declaration of trust by the trustees therefore fails, unless there is some estoppel against the trustees to set up the rule against perpetuities, or unless they are bound by the decree of 1890. Such estoppel can hardly give the Society all that the invalid instrument under which the trustees held purported to give it. It might, however, preclude the trustees from repudiating the trust for a reasonable time. A court of equity might well assume jurisdiction to prescribe due limits upon the duration of the trust in accordance with the policy of the State, thus upholding the charitable trust so far as possible. The trustees may thus be estopped to set up the rule against perpetuities, not by the mere fact that they acquired title claiming under a void instrument, but by the fact of their acceptance of the trust under the direction and orders of the court. Under these circumstances it may be that the State alone can object on the ground of a perpetuity. If the court should prescribe a definite limit for the duration of the trust, there would be a resulting trust thereafter in favor of the residuary devisees, on the theory that the trustees held adversely to the devisees only on behalf of the trust, and their title is established by adverse possession only to the extent of their claim.[8] The failure on the part of the trustees to perform the trust would work a fraud upon the testatrix and her devisees, as well as upon the Society. A constructive trust or estoppel should then be recognized in favor of the charitable institution to the extent or for the time which the law in general permits, with a resulting trust thereafter in favor of the heirs or residuary devisees.[9]

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[8] *Ricard v. Williams* (1822, U. S.) 7 Wheat. 59; (1919) 28 YALE LAW JOURNAL, 220.

[9] See by way of analogy, *Winder v. Scholey* (1910) 83 Ohio St. 204, 93 N. E. 1098, 33 L. R. A. (N. S.) 995; *Amherst College v. Ritch* (1897) 151 N. Y. 282, 45 N. E. 876; *Girard Trust Co. v. Russell* (1910, C. C. A. 3d) 179 Fed. 446.